IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS ADMIRALTY & VICE ADMIRALTY JURISDICTION

ADMIRALTY SUIT NO.73 OF 1999

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M/s.J. Harkishandas & Co. ...Plaintiffs

v/s.

Lloyd Triestino & Anr. ...Defendants

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Mr.U.J.Makhija with Mr.U.B.Singh i/b Mulla & Mulla for the Plaintiffs.
Mr.F.D'vitre with Ms.Wandrewala i/b Akshay Wani for Defendant No.1.
Ms.Vanda Tiwari i/b FZB & Accociates for Defendant No.2.

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CORAM: D.K.DESHMUKH, J.

DATED: 4th August, 2006

JUDGMENT:

1. The facts that are relevant and material for deciding this suit are as under:-

. The Plaintiff is a firm registered under the Indian Partnership Act. The first Defendant is a Foreign Company incorporated under the Foreign laws. The second Defendant is a Nationalised Bank. According to the Plaintiff, it had in or around June 1998 entered into a contract with one M/s.Arasco Trading B.V. to sell and supply to M/s.Arasco a consignment of 2160 S/Bags of Indian Natural Whitish 98/2 Sesame Seed Crop 1997/1998 valued at US $ 73,560 FAQ Istanbul from Kandla to Istanbul, Turkey. The Plaintiff accordingly delivered the said consignment to the agents of the 1st Defendant M/s.Patvolk at Kandla for carriage and delivery of the said consignment from the Port of Kandla to Istanbul, Turkey. Since M/s.Patvolk were not able to arrange for stuffing the goods into the containers, according to the Plaintiff, they got the goods stuffed in six

containers. Those six containers were duly sealed. The Plaintiff got the containers cleared from the custom. On 4-6-1998 upon receipt of the 6 containers M/s.Patvolk issued a Mates Receipt No.004217 dated 4-6-1998 to the Plaintiff acknowledging receipt of the said consignment. According to the Plaintiff, it surrendered the mate’s receipt on 6-6-1998 in exchange of a clear "shipped on board" Bill of Lading dated 4-6-1998 issued by M/s.Patvolk. The said Bill of Lading bears a rubber stamp stating "shipped on Board" dated 4-6-1998. The said endorsement is countersigned by M/s.Patvolk. The Plaintiff on 8-6-1998 negotiated the said Bill of Lading (alongwith all the relevant documents) with the 2nd Defendant for payment. Upon scrutinizing the documents and relying upon the representation contained in the said Bill of Lading, the 2nd Defendant purchased the said documents under their reference No.FBP 003238 P 47096 dated 8-6-1998 and credited the Plaintiffs Packing Credit Account in the sum of Rs.30 lacs being the Rupee equivalent of the Invoice amount of US$ 73,560/- as on 9-6-1998. The Plaintiffs paid the full freight of Rs.3,17,800/- to M/s.Patvolk on 30-6-1998.

2. On about 26-6-1998 the Plaintiffs forwarded a copy of a letter dated 26-6-1998 from the Plaintiffs which was addressed to M/s.Patvolk interalia informing them that the 2nd Defendants had acquired title to the said consignment. They further stated that since the Bill of Lading was issued by M/s.Patvolk, they held them fully responsible for all costs, consequences for non performance of the contract.

3. It appears that the Port of Kandla was hit by cyclone on 9-6-1998. With the result the vessel m.v. Orient Patriot on which the consignment was to be loaded was diverted to Jawharlal Nehru Port Trust. It appears that as a result of the cyclone, the Port authorities of Kandla Port suspended port operation. On 20-6-1998, therefore, the agent of the defendant No.1 addressed a communication to the Plaintiff pointing out therein that the port operations have been suspended due to cyclone. A request was made to the Plaintiffs to surrender the Bill of lading and advice of the Plaintiffs was sought whether the Plaintiffs want to take the cargo back to town. It appears that on 22-6-1998 the Kandla Port Trust Authorities issued two public notices. By first

notice all concerned were informed that the port will be partially recommissioned from 24-6-1998, By second notice all concerned were informed that the goods that are lying in Port should be cleared within 7 days, otherwise the goods will be disposed of by the port authorities. By communication dated 23-6-1998 the agent of the first Defendant informed the agent of the Plaintiffs about this development and asked them to surrender the Bill of Lading. The Plaintiffs by letter dated 26-6-1998 informed the first Defendant that the second Defendant has acquired title to the said consignment and that since the Bill of Lading was issued by the agent of the first Defendant, the Plaintiffs hold the first defendant fully responsible for all costs and consequences for nonperformance of the contract. The Plaintiff states that second Defendant sent all the documents for payment to the banker of the buyer M/s.Arasco with M/s.ING Bank, Amsterdam Branch. The second Defendant was informed by that bank that payment would not be made by the buyer in relation to that consignment. The Plaintiffs state that second defendant also came to know that the consignment was still in India. It appears that there was correspondence between the parties by which the agent of the first Defendant was

asking the Plaintiffs to surrender the bill of lading so that the containers can be destuffed. But the Plaintiffs informed the agent of the first defendant that the title to the consignment has been transferred to second Defendant and therefore they cannot surrender the Bill of Lading. The case of the Plaintiffs was that as the agent of the first Defendant had issued to them a Bill of Lading with the stamp "shipped on Board", the first Defendant was liable for anything that happens to the consignment. According to the Plaintiffs, the stand taken by the first Defendant that the Bill of Lading was stamped only as "Received for shipment" is fradulent.

4. According to the Plaintiffs, they have learnt that the said consignment bound to have suffered severe damage and is a total loss. The buyers M/s.Arasco declined to pay for the value of the said consignment and rejected and return all the documents through their Bankers to the 2nd Defendants. The 2nd Defendants have asked the Plaintiffs to repurchase the documents from them. As the Plaintiffs have not yet been able to do so the 2nd Defendants have proceeded to debit the Plaintiffs' account. All the original documents including the original Bill of

Lading are in possession of the 2nd Defendant, as Bankers of the Plaintiffs. The 2nd Defendant is a necessary party to the suit and have consequently been made co-defendants. The Plaintiffs' account having been debited by the 2nd Defendant is the holder owner/endorsee of the said Bill of Lading for value and are entitled to sue the 1st Defendant for recovery of the value of the said consignment.

5. The Plaintiffs submit that the 1st Defendant has committed a breach of contract and breach of duty by failing and neglecting to carry and deliver the said consignment to the port of discharge at Istanbul despite having issued a shipped on Board Bill of Lading.

6. The 1st Defendant is also guilty of fraud and misrepresentation for having issued a shipped on Board Bill of Lading when in fact the cargo covered under the Bill of Lading was not actually on Board the Defendant vessel.

7. The Plaintiffs submit that had the 1st Defendant and/or its agent not issued a "Shipped on Board" Bill of Lading when the cargo was not on board the vessel,

the Plaintiffs would not have tendered the documents to the 2nd Defendant for negotiation. By virtue of the 1st Defendant and/or its agents misrepresentation, the Plaintiffs have altered their position to their prejudice and detriment and consequently are entitled to seek recompense from 1st Defendant for recovery of the losses and damages suffered by them.

8. According to the Plaintiffs, the 1st Defendant has committed a fundamental breach of contract by failing to load, carry and deliver the said consignment to the final destination. The 1st Defendant is guilty in tort in various acts, neglect, defaults, committed by them and/or their servants and/or agents in the course of their employment and/or agency.

9. The Plaintiffs claim a decree in the amount of US $ 73,560/- together with interest at the rate of 18% per month.

10. Both Defendants have filed their written statement.

. According to the Defendant No.1, the Plaintiffs fraudulently copied stamp of the 1st Defendant’s agent and fraudulently stamped and endorsed the Bill of Lading with the purported endorsement "shipped on board". According to the Defendant No.1, the stamp put on the Bill of Lading was "received for shipment". The date on which the Bill of Lading was issued, no "shipped on board" endorsement could have been made on the Bill of Lading, because the Plaintiffs knew that the vessel on which the cargo was to be loaded was come to the Port initially on 8-6-1998. The Bill of Lading, according to the Plaintiffs itself, was issued on 4-6-1998 and therefore, there was no question of anybody putting a stamp "shipped on board" on the Bill of Lading on 4-6-1998 when the vessel itself was to come to the Port on 8-6-1998. According to the first Defendant, the Plaintiffs were fully aware of this fact and states that the Plaintiffs fraudulently claim that on the Bill of Lading a stamp "shipped on board" was put. It is submitted that the vessel was rescheduled and it was to come to the port on 9-6-1998. It is submitted that the consignment could not be loaded on the vessel because of act of god namely cyclone hitting the port on 9-6-1998. It is submitted that

immediately the fact that because of the cyclone the port operations have been suspended by the port authorities was communicated to the Plaintiffs and the Plaintiffs were requested to surrender the Bill of Lading so that the containers can be destuffed. According to the Defendant No.1 the port authorities would not have permitted the containers to be shifted from the Kandla port without inspection. All the containers for the purpose of destuffing and inspection of the containers, surrender of Bill of Lading was necessary. According to the Defendant No.1, according to the Plaintiffs, the Plaintiffs had transferred the consignment to the second Defendant. According to the first Defendant, there is no transfer of the consignment back from the second Defendant to the Plaintiffs, therefore, the Plaintiffs do not have the locus to file the present suit.

. The Second Defendant also denies the claim made by the Plaintiffs. According to the Defendant No.2, they are holders of the Bill of Lading and other relevant documents relating to the consignment. On the basis of the written statement filed and documents produced by the parties, this Court framed

following issues on 23-2-2001.

I S S U E S

1. Whether the Plaintiffs prove that they are a registered partnership, entitled to maintain this suit?

2. Whether the Plaintiffs prove that they are entitled to sue the 1st defendant for recovery of the value of the said consignment?

3. Whether the Plaintiffs prove that the 1st defendant issued a "shipped on board" billing of lading?

4. Does defendant No.1 prove that the Plaintiffs frequently put a stamp/endorsement "shipped on baord" on the bill of lading?

5. Whether the Plaintiffs prove the 1st Defendant are guilty of conversion as alleged?

6. Whether the Plaintiffs prove that the 1st

Defendants have failed and/or neglected in their duties as bailees of the said cargo to take due care and caution thereof as a man of ordinary prudence would have taken of his own goods?

7. Whether the Plaintiffs prove that under the terms of the Bill of Lading, the 1st Defendants are liable for the alleged loss or damage?

8. Whether the Plaintiffs prove the losses sustained by them?

9. Whether the 1st Defendants are liable to the Plaintiffs for loss caused to them, if any?

10. Whether the Plaintiffs prove that the alleged loss or damage accrued to them on account of misconduct or breach on the part of the 1st Defendants?

11. What order and decree?

ISSUE NO.1

11. So far as issue No.1 is concerned, at the time of argument the Defendant No.1 did not dispute that the Plaintiff is a registered partnership. Hence, issue No.1 is answered in the affirmative.

ISSUES NOS.2,6,8,9 & 10

12. Issues Nos.2,6,8,9 & 10 can be conveniently taken together. According to the Plaintiffs they are entitled to institute this suit for recovery of the value of the said consignment, because according to the Plaintiffs as the second Defendant has debited the account of the Plaintiffs, they are the endorsee of the Bill of Lading for value and therefore they are entitled to institute the suit. The statement is to be found in paragraph 20 of the plaint. Relevant averment reads as under:-

> ....The buyers M/s.Arasco declined to pay for the value of the said consignment and rejected and return all the documents through their Bankers to the 2nd Defendants. The 2nd Defendants have asked the Plaintiffs to repurchase the documents from them. As the

> Plaintiffs have not yet been able to do so the 2nd Defendants have proceeded to debit the Plaintiffs' account. All the original documents including the original Bill of Lading are in possession of the 2nd Defendants, as Bankers of the Plaintiffs. The 2nd Defendants are a necessary party to the suit and have consequently been made co-defendants. The Plaintiffs' account having been debited by the 2nd Defendants are the holders owners/endorsees of the said Bill of Lading for value and are entitled to sue the 1st Defendants for recovery of the value of the said consignment.

13. Perusal of paragraph 7 of the plaint shows that according to the Plaintiffs on 8-6-1998 the Plaintiffs negotiated the said Bill of Lading. The 2nd Defendants purchased the Bill of Lading and the 2nd Defendants paid to the Plaintiffs by crediting the amount in their account of US $ 73,560/- on 9-6-1998. In paragraph 8 of the plaint, the Plaintiffs state " On or about 26-6-1998, the Plaintiffs forwarded a copy of a letter dated 26-6-1998 from the Plaintiffs which was addressed to

M/s.Patvolk interalia informing them that the 2nd Defendants had acquired title to the said consignment." In paragraph 12 the Plaintiffs state "In reply the Plaintiffs addressed a fax dated 20-7-1998 to M/s.Patvolk informing them that the title to goods had already been transferred and regretted their inability to accede to the request of M/s.Patvolk. This fax was followed by another letter dated 21-7-1998 from the Plaintiffs to M/s.Patvolk interalia informing them that the title to the goods covered under the referred Bill of Lading vested with the 2nd Defendants." Thus, it is clear that according to the Plaintiffs on 9-6-1998 the Plaintiffs ceased to be the owner of the goods to which this suit relates. It is clear from paragraph 20 of the plaint, which is quoted above that according to the Plaintiffs they regained title to the goods because the 2nd Defendants debited the Plaintiffs' account. It was argued on behalf of the Defendant No.1 that merely by debiting the account of the Plaintiffs, the 2nd Defendants do not cease to be the owner of the goods. In my opinion, even assuming that the Plaintiffs can regain title to the goods because the account of the Plaintiffs was debited, still the Plaintiffs will not become the owner of the goods

because the Plaintiffs have failed to prove that the account of the Plaintiffs was debited by the 2nd Defendant. The fact that the account of the Plaintiffs was debited by the 2nd Defendant was in the special knowledge of the Plaintiffs, therefore, the burden to prove that fact lay on the Plaintiffs. The 1st Defendants by paragraph 2 of their written statement have denied each and every allegations made by the Plaintiffs in the plaint. Therefore the allegations in the plaint that the 2nd Defendants debited the account of the Plaintiffs was denied by the 1st Defendants. So far as the 2nd Defendants is concerned, the 2nd Defendants in their written statement have replied to paragraph 20 by paragraph 14 of their written statement. Paragraph 14 of the written statement of the 2nd Defendants reads as under:

> With reference to para 20, Defendant No.2 says that they are the holders of the Bill of Exchange and other relating documents for value. Defendant No.2 by and under their Advocate’s letter dated 1st March, 2000 called upon the Plaintiffs to make payment of their outstanding dues including the amount due

> under the suit Bill of Exchanges. The Plaintiff despite receipt of the same has failed and neglected to make payment to Defendant No.2. In the circumstances, Defendant No.2 says and submits that in the event of the Plaintiff succeeding in the above suit and recovering any amount from Defendant No.1 then, in such an event, the Plaintiff be ordered and decreed to pay over the said amount to Defendant No.2.

14. Perusal of the above paragraph 14 from the written statement of the 2nd Defendants shows that the 2nd Defendants do not admit that they debited the Plaintiffs' account and state that the 2nd Defendants continue to be the holder of the Bill of Exchange and other relating documents for value. The 2nd Defendants claim that if the Plaintiffs succeed in the suit, they should be directed to pay the amount recovered by them to the 2nd Defendant. In these circumstances, therefore, the burden to prove the fact that the account of the Plaintiffs was debited by the 2nd Defendant was entirely on the Plaintiffs. The fact that the account of the Plaintiffs was debited by the 2nd Defendants is a fact which can be

proved by a document namely the bank account of the Plaintiffs. The bank account of the Plaintiffs is a document within the power and custody of the Plaintiffs, which the Plaintiffs were in a position to produce. The Plaintiffs have not produced that document. As that fact could be proved only by a document, any oral evidence to prove that fact would not be admissible. Thus, the Plaintiffs have not discharged the burden and have not proved the fact that their account was debited by the 2nd Defendant. It is further to be seen that the witness examined on behalf of the Plaintiffs has stated thus in his cross-examination:

> "The Defendant No.2 has not sued us on the Bill of Exchange on this consignment. The Defendant No.2 has not re-endorsed the Bill of Lading to the Plaintiffs. The Defendant No.2 has not physically delivered to the Plaintiffs the Bill of Lading re-endorsed or otherwise. We had demanded re-delivery of the Bill of Lading from Defendant No.2. I will have to check my records to find out when the Plaintiffs had demanded in writing the re-delivery of the Bill of Lading. This was

> before the suit was filed in this Hon'ble Court. There is no particular reason why we did not mention this demand in this suit. The Defendant No.2 was entitled to refuse the re-delivery of Bill of Lading until such time the advance granted was not refunded. It would be correct to say that the Defendant No.2 retained title to the goods. The title in favour of the Defendant No.2 was by virtue of the advance granted against collateral security of the documents."

15. This witness thus admits that the Bill of Lading has not been re-endorsed by the 2nd Defendant in favour of the Plaintiffs. He also admits that 2nd Defendant was entitled to refuse the re-delivery of Bill of Lading until such time as the advance granted was not refunded. He also admits that the title of the goods is retained by the 2nd Defendant. It is thus clear from the pleadings of the Plaintiffs and the evidence led by the Plaintiffs that the title to the goods was transferred by the Plaintiffs to 2nd Defendant and title was never retransferred by 2nd Defendant to the Plaintiffs. Therefore, the Plaintiffs would not be entitled to institute the

suit for recovery of the value of the consignment of which the Plaintiffs was not the owner.

16. On behalf of the Plaintiffs, it was contended that though the Plaintiffs have pleaded in the plaint that the title to the goods was transferred by the Plaintiffs to the 2nd Defendant, in law the position is otherwise and that the Plaintiffs continue to be the owner of the goods. If the Plaintiffs are right in saying that the Plaintiffs continued to be the owner of the goods, then in my opinion, the Plaintiffs will have to give an explanation as to why the Plaintiffs refused to surrender the Bill of Lading, so that the cargo could be destuffed and loss of the cargo could be avoided. It is to be seen that even assuming that the cargo was entrusted by the Plaintiffs to the 1st Defendant and it was the duty of the 1st Defendant to take care of the cargo, then also as the cargo could not be loaded on the vessel because of cyclone which was act of God, it was the duty of the 1st Defendant to mitigate the damages, and it was the duty of the Plaintiffs to assist the first Defendant in mitigating the loss. Perusal of the correspondence that is placed on record shows that the Port authorities issued a public notice on

22-6-1998 stating that the Port is resuming operations in part from 24-6-1998. It was further stated "all concerned are hereby informed to clear the goods lying in the Port within 7 days of this notice failing which the Port Trust will be constrained to take action to Auction/Dispose the Uncleared/Unclaimed cargoes lying in the Port area. A statement showing list of such goods lying in the Port area is displayed on the Notice Board of Traffic Manager at P & C Building, New Kandla." The agent of the Defendant No.1 informed the Plaintiffs about the notice issued by the Port Authorities and asked the Plaintiffs to surrender the Bill of Lading so that the goods which are lying in the Port could be cleared. By letter dated 26-6-1998 the Plaintiffs informed the agent of the Defendant No.1 "We have since discounted the documents with our bankers- Bank of India, Mandvi Branch who purchased these documents from us. We have received full and final consideration for the goods covered under the referred bill of lading. Bank of India is therefore the holder for value of these goods." By further communication dated 20th July, 1998, the Plaintiffs again informed the agent of the Defendant No.1 that the title of the goods has already been transferred

by them and therefore they cannot do anything in the matter. Thus, the Plaintiffs refused to co-operate with the Defendant No.1 in salvaging the goods by surrendering the bill of lading by taking a definite stand that they are no more owners of the goods and therefore, they can not do anything. In my opinion, now having taken that stand the Plaintiffs can not alter their stand and claim that they were always the owners of the goods and title to the goods was never transferred by them. It is further to be seen here from the correspondence that is placed on record and to which I have referred to above, it is clear that the 1st Defendant could not have done anything in the matter of salvaging the cargo without bill of lading being surrendered by the Plaintiffs and the Defendant No.1 was repeatedly asking the Plaintiffs to co.operate in the matter, but the Plaintiffs refused to co.operate with the Defendant No.1. In my opinion, therefore, it cannot be said that there is failure on the part of the Defendant No.1 in taking due care in relation to the cargo. In my opinion, therefore, the first Defendant cannot be blamed for the damage caused to the cargo and for not taking steps for salvaging the cargo. Issues Nos.2, 6, 8, 9 & 10 are, therefore, answered accordingly against the

Plaintiffs.

Issues Nos.3,4,5 & 7 :

17. The case of the Plaintiffs in relation to the endorsement on the Bill of Lading as found in the plaint is to be found in paragraphs 5 & 6. In paragraph 5 it is stated that on 4-6-1998 when six containers were delivered to the agent of the Defendant No.1 the agent issued the Mates Receipt acknowledging receipt of consignment to the Plaintiffs. In paragraph 6, the Plaintiffs state that the Plaintiffs on 6-6-1998 surrendered the said Mates Receipt in exchange for a Clean "Shipped on Board" Bill of Lading. It is stated that on the Bill of Lading received by the Plaintiffs appears a rubber stamp stating "shipped on Board" and it is dated 4-6-1998. The Defendant No.1 in the written statement denied that on the Bill of Lading a stamp "shipped on board" was put by the Defendant No.1. According to the Defendant No.1, the Bill of Lading was issued on 6-6-1998, the vessel on which the consignment was to be loaded itself was to come to Port on 8-6-1998 and therefore, it was impossible that on 6-6-1998 a stamp "shipped on board" would be

put by the agent of the Defendant No.1 on the Bill of Lading. According to the Defendant No.1, a stamp "received for shipment" was put on the Bill of Lading. According to the 1st Defendant a stamp "shipped on board" on the Bill of Lading is fabricated by the Plaintiffs. In view of the denial the entire burden of proving that the agent of the Defendant No.1 put the stamp "shipped on board" on the Bill of Lading was on the Plaintiffs. The witness Hemant H. Goradia examined on behalf of the Plaintiffs in paragraph 4 of his examination-in-chief states thus "The Plaintiffs on 6th June, 1998 through M/s.Pitamber Laljee & sons, freight brokers (who booked space on board the vessel for the shipper) of the 1st Defendants, thereafter surrendered the said Mates Receipt in exchange for a Clean "shipped on Board" "To Order" Bill of Lading No.KN 802568 dated 4th June 1998 for Port to Port Shipment." Thus, according to this version of the witness for the Plaintiffs, the Bill of Lading with the endorsement "shipped on board" was handed over to the agent of the Plaintiffs M/s.Pitamber Laljee & Sons.

. In cross-examination the same witness states "The Bill of Lading and the Mate’s Receipt do not serve

the same purpose. In the present case it was the freight broker who exchanged the Mate’s Receipt for the Bill of Lading. My office in Bombay gave the Mate’s Receipt to the freight broker with a cheque for the amount of the freight for the purpose of collecting the Bill of Lading. This happened on 6th June 1998. It was on the morning of 6th June 1998 that the Mate’s Receipt, which was in Bombay was given to Pitamber Laljee along with a cheque covering the freight for the purposes of exchanging it for the Bill of Lading. The Mate’s Receipt did not at any point of time come personally into my hands. It is correct to say that the Mate’s Receipt hands come to our office on the morning of 6th June, 1998. It first came into the hands of the staff member who is concerned with preparation of the shipping documents. All inward mail in our office is first given to the partners and then passed on to the concerned department. I came to Bombay in the late night of 5th June 1998. The C & F agent had delivered the Mate’s Receipt to its office in Bombay who in turn delivered it to our office in Bombay. On the evening of 4th June 1998 a faxed copy of Mate’s Receipt was received by us and thereafter we gave instructions to Pitamber Laljee detailing the format of the Bill of

Lading. They in turn prepared a proforma Bill of Lading which was faxed to the Plaintiffs for their approval. Thereafter on the evening of 6th June 1998 the Bill of Lading was delivered to our office in Bombay by the staff member of Pitamber Laljee."

18. Thus, according to the witness the Bill of Lading with the stamp "shipped on board" was delivered to the Plaintiffs by their agent Pitamber Laljee. Mr.Ramesh Parekh, who is the partner of Pitamber Laljee & Sons, the agent of the Plaintiffs, has been examined as a witness. In paragraph 3 he states thus:

> 3. I say that my firm received a photocopy of the mates receipt from the Plaintiff. The Plaintiff asked my firm to get a "Shipped on Board" Bill of Lading issued from Patvolk, the agents of Defendant No.1. My firm however clarified to Mr.Hemant Goradia of the Plaintiff that it would not be possible as the cargo was not loaded on ship as the Vessel had not arrived at Kandla Port and hence only a "Received for shipment" Bill of Lading would be issued. Accordingly our employee had gone

to the office of Patvolk at Mumbai and he was handed over a "Received for shipment" Bill of Lading. Our employee then went to the Plaintiff’s office where he handed over the "Received for Shipment" Bill of Lading to the receptionist of the Plaintiff.

19. In cross-examination this witness has stated that he saying so on the basis of the information received by him and he does not have any personal knowledge about it. A person from the office of the Defendant No.1’s agent has also been examined as a witness. He has also denied that any stamp "shipped on board" was put on the Bill of Lading. Really speaking in view of the denial contained in the written statement of the Defendant No.1 it was for the Plaintiffs to lead evidence of a person who will say that in his presence the bill of lading was prepared and the stamp "shipped on board" was put. The Plaintiffs have not examined a single person who deposes thus. Therefore, it is clear that the Plaintiffs have failed to prove that the stamp "shipped on board" was put on the Bill of Lading issued to the Plaintiffs by the agent of the Defendant No.1. It is clear from the record that the

vessel on which the consignment was to be loaded was to come to the port on 8-6-1998 and that an endorsement "shipped on board" signifies that the consignment has been actually loaded on the vessel. Therefore, on the Bill of Lading issued on 6-6-1998 an endorsement "shipped on board" could not be made in normal course of business. In these circumstances, in the face of denial by the 1st Defendant, it was for the Plaintiff to lead evidence of a person who has personal knowledge, to prove that such an unusual endorsement was actually made by the agent of the 1st Defendant, specially when the agent of the Plaintiffs through whom the Plaintiffs received the Bill of Lading says that the endorsement was "received for shipment". The Plaintiffs have failed to prove that the agent of the 1st Defendant put the stamp "shipped on board" on the Bill of Lading. It is clear from the record that (a) the Plaintiffs delivered the consignment to the agent of the 1st Defendant on 4-6-1998, (b) on 6-6-1998 the agent of the 1st Defendant issued a Bill of Lading; (c) when the Bill of Lading was received by the Plaintiff, the Plaintiff knew that the consignment was to be loaded on the vessel which was scheduled to arrive at port on 8-6-1998, (the Plaintiffs' witness

Mr.Hemant has stated that their agent had given information to them regarding the schedule of the vessel at page 181 of the record); (d) The vessel was rescheduled and now it was to arrive on 9-6-1998; (e) On 8-6-1998 Cyclone hit the port at Kandla, as a result the work at the Port was suspended; (f) On 22-6-1998, notice about recommissioning of the Port was given by the Port authorities and the goods lying at Port were to be cleared within seven days; (g) the Plaintiffs were informed about this by the agent of the 1st Defendant and the Plaintiffs were asked to submit the Bill of Lading for clearing the goods; (h) The Plaintiffs refused to submit the Bill of Lading and to co.operate in salvaging the goods on the ground that it is no longer the owner of the goods. In this situation, therefore, the Plaintiffs can not maintain the suit unless they prove that they repurchased the consignment from the 2nd Defendant. If the case argued on behalf of the Plaintiffs, contrary to pleadings and evidence, that the Plaintiffs never ceased to be the owner of the consignment is accepted, then the Plaintiffs can not succeed in claiming damages for the loss of the cargo unless they give a reasonable explanation as to for what reason they did not submit the Bill of exchange

and co.operate in salvaging the cargo. This is on the assumption that the Bill of Lading was stamped by the agent of the 1st Defendant as "shipped on board". But it is clear that the Plaintiffs have not been able to lead any evidence to prove that the stamp "shipped on board" was put on the Bill of Lading by the agent of the 1st Defendant. Thus looking from any point of view the Plaintiffs have no case. Issues Nos.3,4,5 & 7 are, therefore, answered accordingly against the Plaintiffs.

ISSUE NO.11:

20. The suit thus fails and is dismissed. The Plaintiffs are directed to pay costs of this suit to both the Defendants, as incurred by them.

...